

AMENDMENTS TO THE CALIFORNIA RULES OF COURT

ADOPTED BY THE SUPREME COURT ON APRIL 21, 2021
EFFECTIVE ON APRIL 21, 2021

Title 8. Appellate Rules

Division 7. Publication of Appellate Opinions

Rule 8.1115. Citation of opinions

(a) Unpublished opinion

Except as provided in (b), an opinion of a California Court of Appeal or superior court appellate division that is not certified for publication or ordered published must not be cited or relied on by a court or a party in any other action.

(b) Exceptions

An unpublished opinion may be cited or relied on:

- (1) When the opinion is relevant under the doctrines of law of the case, res judicata, or collateral estoppel; or
- (2) When the opinion is relevant to a criminal or disciplinary action because it states reasons for a decision affecting the same defendant or respondent in another such action.

(c) Citation procedure

On request of the court or a party, a copy of an opinion citable under (b) must be promptly furnished to the court or the requesting party.

(d) When a published opinion may be cited

A published California opinion may be cited or relied on as soon as it is certified for publication or ordered published.

(e) When review of published opinion has been granted

- (1) *While review is pending*

Pending review and filing of the Supreme Court's opinion, unless otherwise ordered by the Supreme Court under (3), a published opinion of a Court of Appeal in the matter has no binding or precedential effect, and may be cited for potentially persuasive value only. Any

citation to the Court of Appeal opinion must also note the grant of review and any subsequent action by the Supreme Court.

(2) *After decision on review*

After decision on review by the Supreme Court, unless otherwise ordered by the Supreme Court under (3), a published opinion of a Court of Appeal in the matter, and any published opinion of a Court of Appeal in a matter in which the Supreme Court has ordered review and deferred action pending the decision, is citable and has binding or precedential effect, except to the extent it is inconsistent with the decision of the Supreme Court or is disapproved by that court.

(3) *Supreme Court order*

At any time after granting review or after decision on review, the Supreme Court may order that all or part of an opinion covered by (1) or (2) is not citable or has a binding or precedential effect different from that specified in (1) or (2).

Comment

Subdivision (e)(1). ~~In two respects, this subdivision alters the effect of published Court of Appeal decisions after review is granted by the Supreme Court and while a decision on review is pending.~~

~~Under *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, published “[d]ecisions of every division of the District Courts of Appeal are binding upon all the . . . superior courts of this state . . .” (*Id.*, at p. 455.) The nature of this binding effect changes when there are conflicting published Court of Appeal opinions: in that circumstance, the superior court is still bound, but it “can and must make a choice between the conflicting decisions.” (*Id.*, at p. 456.) Because The practice and rule in effect before July 1, 2016, automatically depublished the Court of Appeal decision under review, superior courts were not allowed to choose to be bound by the appellate court decision that was under review rendering it uncitable. Under new subdivision (e)(1) of this rule, if the Supreme Court grants review of a published Court of Appeal decision, that decision now remains published and citable for its potentially persuasive value while review is pending and yet—similar to the result under the former rule—it will not have binding or precedential effect on the superior courts, but will instead have a lesser status of “potentially persuasive value only.” unless the Supreme Court orders otherwise. Accordingly, pursuant to the new rule (as before), when a decision that is pending review conflicts with another published Court of Appeal decision that is not under review, only that other published decision will continue to have binding or precedential effect on the superior court.~~

Under the authority recognized by subdivision (e)(3) of this rule, and as explained in the second paragraph of the comment to that subdivision, by standing administrative order of the Supreme Court, superior courts may choose to be bound by parts of a published Court of Appeal decision under review when those parts conflict with another published appellate court decision. (See *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 456 (*Auto Equity*) [“where there is more than one appellate court decision, and such appellate decisions are

in conflict[.] . . . the court exercising inferior jurisdiction can and must make a choice between the conflicting decisions”].)

~~Subdivision (e)(1) also slightly alters practice with respect to the Court of Appeal pending decision after grant of review.~~ Finally, it has long been the rule that no published Court of Appeal decision has *binding* effect on any other Court of Appeal (e.g., *In re Marriage of Hayden* (1981) 124 Cal.App.3d 72, 77, fn. 1; *Froyd v. Cook* (E.D.Cal. 1988) 681 F.Supp. 669, 672, fn. 9, and cases cited) or on the Supreme Court. Under prior practice and the former rule, ~~because~~ a grant of review automatically depublished the decision under review. For this reason, the Court of Appeal was not allowed to cite or quote that review-granted decision concerning any substantive point. Under ~~the new~~ this subdivision, a published Court of Appeal decision as to which review has been granted remains published and is citable, while review is pending, for any potentially persuasive value.

Subdivision (e)(2). The fact that a Supreme Court decision does not discuss an issue addressed in the prior Court of Appeal decision does not constitute an expression of the Supreme Court’s opinion concerning the correctness ~~of the result~~ of the decision on that issue or of any law stated in the Court of Appeal decision with respect to any such issue.

Subdivision (e)(3). This subdivision specifically provides that the Supreme Court can order that an opinion under review by that court, or after decision on review by that court, have an effect other than the effect otherwise specified under this rule. For example, the court could order that, while review is pending, specified parts of the published Court of Appeal opinion have binding or precedential effect, rather than only potentially persuasive value. For purposes of subdivision (e)(2) and (3), a “decision on review” includes any order by the Supreme Court dismissing review. (See rules 8.528(b) [addressing an “order dismissing review”] & 8.532(b)(2)(B) [listing, among “decisions final on filing,” an order filed under rule 8.528(b)].) Accordingly, upon dismissal of review, any published Court of Appeal opinion regains binding or precedential effect under rule 8.1115(e)(2) unless the court orders otherwise under that rule’s subdivision (e)(3).

As provided in *Standing Order Exercising Authority Under California Rules of Court, Rule 8.1115(e)(3), Upon Grant of Review or Transfer of a Matter with an Underlying Published Court of Appeal Opinion, Administrative Order 2021–04–21*, under this subdivision, when the Supreme Court grants review of a published Court of Appeal opinion, the opinion may be cited, not only for its persuasive value, but also for the limited purpose of establishing the existence of a conflict in authority that would in turn allow *superior courts* to exercise discretion under *Auto Equity, supra*, 57 Cal.2d at page 456, to choose between sides of any such conflict. Superior courts may, in the exercise of their discretion, choose to follow a published review-granted Court of Appeal opinion, even if that opinion conflicts with a published, precedential Court of Appeal opinion. Such a review-granted Court of Appeal opinion has only this limited and potential precedential effect, however; superior courts are not *required* to follow that opinion’s holding on the issue in conflict. Nor does such a Court of Appeal opinion, during the time when review is pending, have *any* precedential effect regarding any aspect or holding of the Court of Appeal opinion outside the part(s) or holding(s) in conflict. Instead it remains, in all other respects, “potentially persuasive only.” This means, for example, that if a published Court of Appeal opinion as to which review has been granted addresses “conflict issue A,” as well as another issue as to which there is no present conflict—“issue B”—the Court of Appeal’s discussion of “issue B” remains “potentially persuasive” only, unless and until a published Court of Appeal opinion creates a conflict as to that issue. This

paragraph of this comment applies with respect to all published Court of Appeal opinions giving rise to a grant of review by the Supreme Court on or after April 21, 2021.

Finally, as also provided in the administrative order, *supra*, under this subdivision, unless the Supreme Court specifies otherwise, an order transferring a matter to the Court of Appeal with directions to vacate its published opinion and reconsider the matter has the following effect: (1) If the Court of Appeal opinion has not yet been published in the bound volumes of the Official Appellate Reports, the opinion is deemed to be depublished (that is, the Reporter of Decisions is directed not to publish it in the Official Appellate Reports); or (2) If the underlying Court of Appeal opinion has already been published in the bound volumes of the Official Appellate Reports (or publication is imminent and hence as a practical matter the volume cannot be revised to eliminate the opinion), the underlying Court of Appeal opinion is deemed to be “not citable”—meaning it has neither precedential nor even potentially persuasive value, even though it will not be removed from the Official Appellate Reports. This paragraph of this comment applies only to such transfers occurring on and after April 21, 2021.